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October 1, 1984

US EPA RECORDS CENTER REGION 5



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The Honorable Paul A. Magnuson
United States District Judge
United States District Court
754 United States Courthouse
316 N. Robert Street
St. Paul, MN 55101

BY MESSENGER

Re: United States v. Reilly Tar & Chemical Corporation
Civil No. 4-80-469

Dear Judge Magnuson:

This letter is submitted on behalf of the United States, the State of Minnesota, and the City of St. Louis Park in response to your request at the September 19 status conference that the parties work out a stipulated order addressing division of issues into two (or more) trial phases, management of discovery, and matters related to appointment of a Special Master. Counsel for these plaintiffs and counsel for Reilly met for six and one-half hours last Thursday and four hours last Saturday to work on the stipulated order. Counsel for the City of Hopkins also attended the Thursday session. The product of the discussions is the enclosed eleven page document entitled "Case Management Order - Stipulated Provisions." It reflects agreements reached between the United States, the State, St. Louis Park and Reilly on case bifurcation and on most discovery issues, but disagreement among these plaintiffs and Reilly (1) on the timing of expert witnesses' reports, and depositions, (2) on the duties and compensation scheme for the Special Master, and (3) on a few lesser matters. Agreement was reached to recommend the following retired jurists for Special Master:

1. Honorable Walter Rogosheske
2. Honorable Rolf Fosseen
3. Honorable Earl R. Larson

The balance of this letter will address the areas of disagreement between the plaintiffs 1/ and Reilly, and will be

1/ Gary Hansen, recently appointed counsel for the City of Hopkins, has advised us that Hopkins envisions a minimal role in the Phase I trial and has no objections to the trial division proposed in paragraph 1 of the stipulated provisions. If claims under the Minnesota Environmental Response and Liability Act (MERLA) are subsequently added by the State, as suggested in this letter at note 4, Hopkins likely would also wish to seek leave to add such claims.

Honorable Paul Magnuson
Page Two
October 1, 1984

organized to follow the paragraphs of the "Case Management Order - Stipulated Provisions" (hereinafter "Stipulated Provisions").

1. Paragraph 4 - Phase II Discovery.

St. Louis Park requests that Reilly provide such responses to its admission requests as may be ordered by the Court in its ruling on the appeal from Magistrate Boline's July 12, 1984 Order. These responses may serve to narrow issues and facilitate an overall settlement and should not require much additional time on Reilly's part if it has been conscientious in its initial efforts to respond to the requests.

2. Paragraph 6 and Paragraph 12 - Expert Reports and Depositions.

The United States and the State will jointly present all of the expert witnesses on behalf of the plaintiffs. The United States and the State suggest that December 31, 1984 be established as a due date for reports by experts, both those already retained and those to be retained in the near future. 2/ The United States would agree, in order to facilitate expert depositions, to have one expert report ready by November 30, 1984, and to have that expert's deposition taken in December 1984. One Reilly expert should have a report due and be ready for depositions at those times. The other expert depositions could commence after the first of the year and, as agreed in the Stipulated Provisions, would be completed by March 22, 1985. These periods for expert depositions should provide ample time and would not result in an extension of the discovery cut-off date to which the parties have agreed in paragraph 17 of the Stipulated Provisions.

This three month period for expert reports is identical to that provided in Paragraph 8 of the order in United States v. Price, submitted to the Court by Mr. Schwartzbauer with his letter of September 21, 1984, and is most reasonable under the circumstances. Most of the plaintiffs' experts have extensive professional commitments in addition to their work on this case.

2/ To facilitate exchange of expert information, the United States and the State offered to exchange computer ground water models with Reilly as early as October 15, 1984. Because of scheduling commitments of Reilly's expert, the exchange will be deferred until October 30, 1984.

Honorable Paul Magnuson
Page Three
October 1, 1984

For example, plaintiffs' hydrogeology expert Professor Hans Olaf Pfannkuch has just commenced the new academic year at the University of Minnesota and plaintiffs' toxicology expert Dr. James Selkirk, a renowned research scientist with the Oak Ridge National Laboratories, has a heavy schedule of speaking and conference commitments for the next forty days. 3/ Since it was anticipated prior to the September 19 conference that Reilly's extensive fact witness deposition schedule would run at least into late November, it would bring unexpected pressures on the plaintiffs' experts now to require their reports and depositions before the end of the year.

As to the depositions of non-expert witnesses relevant to Phase I, the plaintiffs have no objection to Reilly's suggestion at our meeting of commencing such depositions at the beginning of December. Plaintiffs presently envision that the only such deposition they need to take is the reopening of the deposition of former Reilly plant manager Herbert L. Finch in order to inquire about information gained since Mr. Finch's deposition in the summer of 1982.

3. Paragraph 20 - Special Master Provisions.

The Additional Plaintiffs' Provisions include our recommendation that the Special Master designated by the Court be limited at present to handling discovery disputes in lieu of the Magistrate. The plaintiffs envision additional settlement discussions in the near future and believe all parties will engage in the kind of reasonable dialogue necessary to determine if there is a common ground for settlement. We do not think that the potential benefits of a Special Master's involvement in the discussions outweigh the substantial expense to all parties of having the Special Master learn about about all the disputed issues and participate in extended and complex negotiations. Moreover, we are concerned that free discussion of sensitive settlement issues may be inhibited by the presence at the discussions of the same person who is ruling on disputed legal issues between the parties.

3/ During this time, Dr. Selkirk is to attend committee meetings of the National Institute of Health, the National Cancer Institute's Metabolic Section, and the International Symposium on Polyaromatic Carcinogens. He is also to give two lectures during this period.

Honorable Paul Magnuson
Page Four
October 1, 1984

In regard to compensation of the Special Master, the plaintiffs believe that payment for the Special Master's time in resolving discovery disputes should be paid one-half by the party(ies) bringing the motion and one-half by the party(ies) opposing the motion. Other compensation should be paid one-half by defendant Reilly and one-half by the three active plaintiffs. This scheme would minimize unnecessary recourse to the Special Master and would also recognize that St. Louis Park is likely to have very little involvement in much of the Phase I discovery and should not be asked to bear a share of the compensation disproportionate to its involvement.

In regard to the authority and funding for the United States' participation in compensation of the Special Master, Mr. Hird is submitting a separate letter dated September 28, 1984, which we are enclosing with this letter. State funding for the Special Master must come from legislative appropriations authorized for such purposes and the appropriation to be tapped in this instance is the State "Superfund" established by Minnesota Environmental Response and Liability Act ("MERLA"). Under MERLA, authorization to use the Superfund must be obtained from the Board of the Minnesota Pollution Control Agency. Such authorization will be recommended and will be sought at one of the next meetings of the MPCA Board, likely in late October or November. 4/ Until this funding is approved, the State cannot firmly commit to funding of the Special Master.

4. Paragraph 21 - Dispositive Motions.

The plaintiffs oppose a bar to the bringing of dispositive motions, as proposed by Reilly in Mr. Schwartzbauer's September 17 letter to the Court. The appropriateness of submitting such motions can best be determined on a case-by-case basis. For example, it is premature to bar any renewed motion addressing the unconstitutionality of CERCLA while such issue is presently pending before the Eighth Circuit in the NEPACO case on appeal from the Western District of Missouri. The plaintiffs oppose any Reilly suggestion to bar all dispositive motions during Phase I preparations.

4/ The Minnesota Pollution Control Agency Board is likely to consider action on the Reilly site as well as funding for the Special Master and expert witnesses at such a meeting. One consequence of the Board's action may be a request by the State, and perhaps other plaintiffs, for leave to amend its complaint to include a count under MERLA.

Honorable Paul Magnuson
Page Five
October 1, 1984

Respectfully submitted,

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Land and Natural Resources Division
U.S. Department of Justice

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KATHLEEN M. MARTIN

SS:mah

cc: All Counsel of Record

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

UNITED STATES OF AMERICA

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,
its Department of Health, and its
Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;
HOUSING AND REDEVELOPMENT AUTHORITY
OF ST. LOUIS PARK; OAK PARK VILLAGE
ASSOCIATES; RUSTIC OAKS CONDOMINIUM
INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

CASE MANAGEMENT ORDER -
STIPULATED PROVISIONS

Pursuant to the request of the Honorable Paul A. Magnuson at a pre-trial conference held on September 19, 1984, the parties hereto, through their respective attorneys, agree that a case management order may be entered by the Court without further notice to any party, including the following provisions:

1. The trial of this action is bifurcated into two phases. Phase I, which shall be tried first, shall determine (a) whether the defendant Reilly Tar & Chemical Corporation ("Reilly") is liable to the plaintiff and plaintiff-intervenors (hereinafter grouped as "plaintiffs") under section 7003 of RCRA, 42 U.S.C. § 6973, and under sections 106 and 107 of CERCLA, 42 U.S.C. § 9606-9607, and (b) all remedial measures which are necessary and appropriate under section 104 or 106 of CERCLA, the National Contingency Plan, or any other law. Reilly's defense of the unconstitutionality of these statutes shall also be determined. Reilly's laches defense to the United States' claims and Reilly's several defenses to the plaintiff-intervenors' claims shall be reserved to Phase II.

Phase II, which will be tried at a date to be designated by the Court after the trial of Phase I, will relate to all other issues between the parties, including (1) claims for reimbursement of costs, (2) claims for natural resource damages, and (3) issues arising only between Reilly and the intervening plaintiffs. Except as provided in paragraph 2 hereof and as to claims for contribution from other parties, issues tried in Phase I shall not

be relitigated in Phase II. This order is without pre- judice to any parties' right to move for a further severance or other relief with respect to the issues in Phase II, after the conclusion of Phase I.

2. Because Reilly has demanded a jury trial, and because there has been no severance, the Court makes the following orders to protect the right to jury trial guaranteed by the Seventh Amendment to the United States Constitution:

- (a) all issues in Phase I will be tried by the Court without a jury;
- (b) the Court's findings in Phase I shall not be binding against any party with respect to issues in Phase II on which that party has a constitutional right to a jury trial, and with respect to which a jury trial has been demanded.

3. Following the completion of the trial on Phase II, the Court may modify its judgment on Phase I in any manner deemed to be equitable and appropriate based on evidence received in Phase II. Reilly's implementation of any portion of the remedy prior to Phase II shall not be deemed a waiver of its defenses not determined in Phase I.

4. Discovery as provided herein shall proceed upon all Phase I issues. Discovery on Phase II issues is stayed pending the further order of the Court, except as to depositions necessary to preserve testimony which are approved by the Special Master ap-

pointed hereunder. This order is without prejudice to the right of the City of St. Louis Park to petition the Court for responses to any requests for admission presently on appeal. This order shall govern Phase I discovery.

5. Some of the expert witnesses have been retained by the parties prior to October 1, 1984; however, it is contemplated that additional expert witnesses may be retained by them. Such experts will be referred to in this stipulated order as "retained" experts and "additional" experts, respectively.

6. All parties shall serve copies of the reports of their retained experts (or a fair summary of their expected testimony) by _____. These reports shall set forth in detail the subject matter upon which the expert is expected to testify, and shall include the substance of the facts and opinions to which the expert is expected to testify and the grounds for each opinion. In addition, the report shall designate all published and unpublished reports, studies and information relied upon. Reports, studies and information not previously produced shall be produced upon request if they are not reasonably accessible to the opposing party and the burden of production is not unreasonable.

Illustrative exhibits to be used by expert witnesses at trial must be furnished to opposing counsel no later than thirty (30) days prior to trial.

7. On or before October 31, 1984, the parties shall exchange the following documents in their custody or control or control of

their experts which pertain to wells or soil borings located on the Reilly site, studied in order to assess the pollution ascribed to the Reilly operations, or studied in order to assess other possible sources of ground water pollution in the St. Louis Park area:

- (a) all chemical and physical analyses of samples of soil and water, including all data stored in the Land Management Information Center data base of the State of Minnesota and in the Reilly-ERT data base;
- (b) protocols and quality assurance/quality control procedures used for the collection, sampling and analyses; and
- (c) water level measurements, stratigraphic log and construction materials.

Best efforts shall be made by the parties receiving these documents to work with the producing party to avoid repeat production of documents already produced. Hereafter each party which proposes to take additional samples from the site or from other locations in St. Louis Park will give one week's notice of such intent to each other party who has, or is taking samples, and the other parties shall have the opportunity to split grab samples and to split other samples where feasible. The parties shall exchange protocols used in such sampling and analyses, and shall exchange the results of the analyses.

8. On or before October 30, 1984, the parties shall exchange ground water models including results and procedures used.

9. All written interrogatories and requests for production relating to Phase I shall be served no later than November 1, 1984, and responses thereto shall be served by December 21, 1984.

10. Each party shall serve upon opposing parties by December 14, 1984, a list of all documents withheld from production prior to May 1, 1984, on the ground of privilege. Documents subsequently withheld on the basis of privilege shall be listed by January 8, 1985. Direct or indirect communications between counsel, and the expert witnesses, and communications occurring during the pendency of this action and the amended state court action subsequent to April 1, 1978, between co-counsel and between counsel and their clients or their legal staff, need not be produced or listed.

11. All motions to compel the production of documents concerning Phase I discovery shall be filed by January 26, 1985, and shall be heard by the Special Master appointed hereunder. Prior to filing such a motion, a party seeking to compel the production of documents shall meet with the opposing party in an attempt to resolve the parties' differences concerning the documents sought to be produced.

12. Oral depositions of retained experts and other oral depositions related to Phase I may commence _____. The parties shall confer and attempt to reach agreement upon a schedule of oral depositions. Best efforts shall be made to see that the sequence of such experts' depositions shall alternate between

plaintiffs' experts and defendant's experts, commencing with a plaintiffs' expert. The schedule will be established and discovery shall proceed, so that neither side shall pre-empt a disproportionate portion of the discovery procedure. Each party shall bear the cost of its own experts at this stage of the proceeding.

13. All "additional" experts shall be retained or assigned, and a report or summary of the testimony of such experts shall be furnished to opposing counsel, on or before December 31, 1984.

14. All requests for admission of fact or authenticity of documents shall be served by February 1, 1985.

15. All fact witnesses to be called by any party relative to Phase I shall be identified and a summary of their expected testimony served upon opposing counsel by January 14, 1985.

16. Depositions of "additional" experts whose identity was disclosed by December 31, 1984 may commence January 8, 1985.

17. All discovery regarding Phase I including responses to discovery and filing of motions to compel shall be completed by March 22, 1985. Notwithstanding the prior sentence, motions to compel deposition testimony may be filed up to ten (10) days after conclusion of the deposition.

18. Each party who has furnished a final report of an expert may, on or before April 3, 1985, serve a supplemental expert's report explaining newly obtained data or responding to the other parties' final reports or containing a critique or rebuttal of the

other reports in a manner reasonably apprising the adverse parties of the expert's opinion regarding the adequacy, appropriateness or correctness of the adversary's final report.

All analytical data to be introduced at trial shall be listed by the party intending to introduce it and such list shall be served upon the other parties who have been involved in the sampling by April 3, 1985. The parties will meet to discuss objections to the data prior to the final pre-trial conference.

Upon the trial of this matter, the Court will determine whether to admit exhibits or testimony which were not disclosed through reports, supplemental reports, or depositions based upon the circumstances established for any failure to make a full disclosure. Due regard will be given to the problems of trial counsel in preparing for the trial of a case of this magnitude, but deliberate failure to disclose will result in the rejection of the evidence.

19. A status conference will be held before this Court at 8:30 a.m. on November 8, 1984, and a final pre-trial conference will be held on April 10, 1985. Unless otherwise ordered, trial of Phase I shall commence on April 29, 1985. Before the date of the final pre-trial conference, the parties shall serve and file (a) proposed findings of fact and conclusions of law, (b) memoranda of contentions of fact and law, (c) designations of portions of depositions to be read, (d) final lists of fact witnesses and expert witnesses, (e) lists of exhibits, premarked by the party

offering them, and (f) motions in limine. Counsel shall meet following the pre-trial conference to discuss additional objections to exhibits. Objections shall be filed no later than five days prior to trial.

20. [This paragraph should deal with the role of the special master and the method of compensation for the special master. The parties are unable to agree on this provision.]

21. No discovery request not timely served under this order may be served without leave of the Court or Special Master. [The parties are unable to agree whether dispositive motions may be filed before the close of discovery.]

22. Any opposed application for an extension of the foregoing deadlines must be in writing and served upon counsel for each party having an interest in the extension. Any opposed application must disclose (a) the precise relief sought, (b) good cause for such extension, and (c) a statement regarding the

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positions of counsel for other interested parties regarding the application.

Dated: October 1, 1984.

UNITED STATES OF AMERICA
Plaintiff

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Approved by the Court:

Paul A. Magnuson
Judge of United States District Court

Date of Approval: _____

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